7-26-2011

Stark v. Assisted Living Concepts, Inc. Appellant's Brief Dckt. 38715

IN THE SUPREME COURT OF THE STATE OF IDAHO

BROOKE A. STARK,

Claimant/Respondent,

vs.

ASSISTED LIVING CONCEPTS, INC.

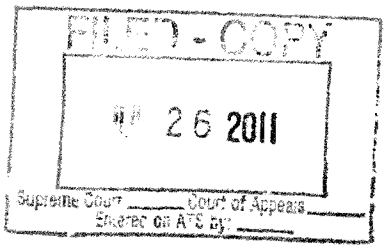
Employer/Appellant,

and

IDAHO DEPARTMENT OF LABOR,

Respondent.

Supreme Court No. 38715



APPELLANT'S OPENING BRIEF

Appeal from the Industrial Commission of the State of Idaho
of the State of Idaho in and for the County of Ada

Honorable Idaho Industrial Commission Chairman Thomas E. Limbaugh presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

Cases

Statutes

I. STATEMENT OF THE CASE

A. Nature of the Case.

Assisted Living Concepts, Inc. ("ALC") appeals from a decision of the Industrial Commission ("the Commission") awarding unemployment benefits to Brooke A. Stark ("Stark"). ALC asks this Court to overturn the Commission's Decision and Order awarding Stark unemployment benefits and it asks that the Court direct the Commission to deny Stark benefits.

B. Proceedings Below.

This appeal has its genesis in a claim for unemployment benefits Stark filed with the Department of Labor ("the Department"). On December 27, 2010, Appeals Examiner Thomas Holden held a telephonic hearing in this matter, in which testimony was heard and evidence presented. Decision of Appeals Examiner, R. 1. The Appeals Examiner issued a determination in which he made detailed findings of fact and conclusions of law. R. 1. The Examiner found that Stark was not eligible for unemployment benefits because she was discharged for insubordination, which is misconduct under Idaho Code Section 72-1366(5).

Stark appealed this decision to the Commission. R. 7. On February 28, 2011, the Commission filed the Decision and Order that is the subject of this appeal. R. 21. In its Decision, the Commission (with some changes and omissions) adopted the Appeals Examiner's findings of fact. R. 21. The Commission concluded that ALC did not establish misconduct, and that Stark's actions fell within an exception to misconduct. R. 21. The Commission ordered that ALC's account be chargeable for any benefits that Stark received. R. 21. ALC then filed its Notice of Appeal to the Court on April 11, 2011. R. 30.

C. **Statement of Facts.**

ALC operates assisted living facilities. Claimant Brooke Stark ("Stark") was employed by ALC from April 21, 2008, through October 29, 2010. Tr. p. 14, LL. 16-18. Stark was the residence director of Sylvan House, an assisted living facility. Tr. p. 14, LL. 19-20.

On Friday, October 29, 2010, Stark spoke on the telephone with Matt Cable ("Cable"), who was the regional director of sales and marketing for ALC, to discuss various work topics. Tr. p. 14, L. 25 to p. 15, L. 4. Cable was a member of regional management who covered both Sylvan House (where Stark was employed), as well as several other facilities, including one named Teton House. Tr. p. 6, LL. 14-16. During that conversation, Stark informed Cable that she had information that Teton House was closing. Tr. p. 6, LL. 5-13; p. 15, LL. 5-11. Cable was very concerned about the information the Stark had provided about Teton House closing, and later that day he contacted divisional director of Human Resources, Craig Boyes ("Boyes") and informed him of this development. Tr. p. 6, LL. 5-10.

That evening, at approximately 6:30 p.m., Boyes called Stark and told her he had had a conversation with Cable and that Cable had asked if Teton House was, in fact, closing. Tr. p. 15, LL. 12-16. Because this information that Teton House was closing was important and could have negative affects on other employees and residents, Boyes believed it was necessary to get to the root of the matter. Tr. p. 6, LL. 16-21; p. 19, LL. 6-18. When Boyes asked Stark where she obtained her information that Teton House was closing, Stark informed Boyes that she had "lots of sources, lots of friends within the company, and that [she] didn't feel it necessary to

reveal a confidence that was told to [her] and that [she] wasn't going to tell him." Tr. p. 15, LL. 13-20.

Boyes considered the information about Teton House closing so important that he immediately called ALC's President and CEO, Lori Bebo ("Bebo"). Tr. p. 5, LL. 17-19; p. 6., LL. 10-21; p. 19, LL. 16-18. Bebo also considered Stark's information that Teton House was closing to be "very important." Tr. p. 6, LL. 25- p. 7, L. 2. Approximately five minutes later, Boyes called Stark again and added Bebo to the call. Tr. p. 15, LL. 21-23; p. 6, LL. 21-24. Rumors of closing were not common. Tr. p. 19, L. 6. Such rumors have negative implications from a company perspective and also for members of the Teton House community, including families, residents and employees. Tr. 19, LL. 16-18. Bebo had never had any direct dealings with other rumors of houses closing, and the rumor that Teton House was closing was taken extremely seriously by Bebo, Boyes and Cable (as shown by their immediate response to locate the source of this information). Tr. p. 19, LL. 6-18.

Bebo asked Stark if she told Cable earlier that day that Teton House was closing, and Stark indicated she had done so. Tr. p. 7, LL. 2-4. When Bebo asked Stark who told her that information, Stark informed Bebo that it could have been a number of people. Tr. p. 7, LL. 4-7. Bebo stressed to Stark that information relating to the closure of Teton House was very important. Bebo specifically informed Stark that she wanted to put an end to the rumors. Tr. p. 17, LL. 3-4. This information was very recent, and Bebo pointedly asked Stark who had passed on that information to her. Tr. p. 7, LL. 7-9. Stark informed Bebo that she did not want to share that information. Tr. p. 7, LL. 10-11. Again, Bebo asked Stark if she understood how

important this information was, because ALC needed stop any further rumors, because ALC needed to inform personnel to assure them and let them know that the rumor was untrue. Stark told Bebo she understood the importance.[1] Tr. p. 7, LL. 11-17.

Finally, after explaining how important this information was and emphasizing why ALC needed to know who told Stark that Teton House was closing, Bebo specifically directed Stark to answer "who had provided you with the information that Teton House was closing." Tr. p. 7, LL. 17-19. Stark told Bebo that she would not share that information. Stark further stated she would have to "take one for the team." Tr. p. 7; LL. 17-21.

At that point, when Stark point-blank refused to answer a direct request of the President and CEO of the company, Bebo placed Stark under suspension, pending an investigation. Bebo informed Stark that divisional director of Human Resources, Craig Boyes, would follow up with her. Tr. p. 7, LL. 21-24.

ALC's vice president of Human Resources, Rick Parker ("Parker"), conducted an investigation into Stark's refusal to provide the information requested by ALC. Tr. 11, LL. 8-11. Parker's investigation confirmed the following: That Stark had informed Matt Cable that a building was closing (Teton House), which caused concern for Cable; that Cable then called Boyes; that Boyes then called Stark, who refused to tell Boyes who had shared that information with her; that Boyes then contacted President and CEO, Lori Bebo, who in turn called Stark and

[1] At the hearing, however, Stark contradicted herself and testified that she did not believe that a rumor concerning a house closing would directly influence the company. Tr. p. 17, LL. 21-23.

asked her source of information that Teton House was closing; that again Stark refused to tell Bebo; and that Stark informed Bebo that she would have to take one for the team. Tr. p. 12, LL. 1-19.

As a result of his investigation, Parker concluded that Stark refused to follow a direct order from a supervisor, and that refusal constituted insubordination, which was Class 3 infraction in ALC's employee handbook. Tr. p. 12, L. 25 – p. 13, L. 3. A Class 3 infraction can result in discharge, with no warning. Tr. p. 8, LL. 6-10. Accordingly, Stark was discharged for refusal to follow a direct order from a supervisor, insubordination. Tr. p. 8, LL. 22 – p. 9, L. 3; Exhibit 4, p. 7. She was discharged effective on the date of her suspension, October 29, 2010. Tr. p. 8, LL. 16-21.

ALC's concerns over the seriousness of the rumors were later substantiated, as this rumor caused families to move out of Teton House, and ALC was then forced to close the building. Tr. p. 9, LL. 7-11.

II. ISSUES ON APPEAL

1. Whether the Industrial Commission's finding that Claimant did not engage in misconduct is substantiated by competent evidence.

2. Whether the Industrial Commission's decision is contrary to the evidence presented.

III. ARGUMENT

A. Standard of Review.

This Court exercises free review over the Industrial Commission's legal conclusions. *Laundry v. Franciscan Health Care Ctr.*, 125 Idaho 279, 869 P.2d 1374 (1994), *see also Moore v. Melaleuca*, 137 Idaho 23, 43 P.3d 782 (2002). The Industrial Commission's decision must be supported by substantial and competent evidence. *Uhl v. Ballard Med. Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*, citing *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). Substantial evidence is more than a scintilla of proof, but less than a preponderance. *Brewer v. La Crosse Health & Rehab.*, 138 Idaho 859, 861, 71 P.3d 458 (2003). The court also must set aside an order of the Commission where it fails to make a proper application of the law to the evidence. *Bortz v. Payless Drug Store*, 110 Idaho 942, 945, 719 P.2d 1202, 1205 (1986).

B. The Commission's Conclusion – That Stark Did NOT Engage in Misconduct By Refusing To Provide Her Superiors with Important Requested Information – Is Not Supported by Substantial and Competent Evidence.

An employee is not eligible for unemployment benefits if the unemployment is the result of "discharge[] for misconduct in connection with his employment." IDAHO CODE § 72-1366(5). Whether the discharge for misconduct is work-related "is a factual determination." *Beaty v. City of Idaho Falls*, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986). Employment-related misconduct includes any of the following: "(1) a willful, intentional disregard of the employer's interest; (2) a deliberate violation of the employer's reasonable rules;

or (3) a disregard of a standard of behavior which the employer has a right to expect of his employees." *Kivalu v. Life Care Ctrs. of Am.*, 142 Idaho 262, 264, 127 P.3d 165, 167 (2005); IDAPA 09.01.30.275.02. "The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer, and where the burden is not met, benefits must be awarded to the claimant." *Harris v. Elec. Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004); IDAPA 09.01.30.275.01.

The Commission must consider all three grounds when determining whether an employee's termination was a result of employment-related misconduct. *Smith v. Zero Defects, Inc.*, 132 Idaho 881, 884, 980 P.2d 545, 548 (1999). The focus of the inquiry is not whether the employer's reason for discharge was reasonable but, rather, whether the misconduct was work-related so as to make the employee ineligible for unemployment benefits. *Beaty v. City of Idaho Falls*, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

In this case, the Commission failed to consider all three grounds for misconduct and instead determined that the issue could be disposed of under the standard of behavior test and, thus, based its decision on the unsupportable ground that Stark's refusal to divulge the source of the rumor did not fall below the reasonable standard of behavior an employer is entitled to expect. The Commission completely failed to consider whether Stark's refusal to provide requested information demonstrated a willful, intentional disregard of the employer's interest.

1. Stark's point-blank refusal to provide information requested by ALC's President and CEO falls below the standard of behavior expected by a reasonable employer.

Under the standard of behavior test, the employer must prove, by a preponderance of the evidence, that (1) the employee's conduct fell below the standard of behavior expected by the employer; and (2) the employer's expectations were objectively reasonable under the circumstances. *Harris*, 141 Idaho at 4, 105 P.3d at 270; IDAPA 09.01.30.275.02(c). Generally, an employer's burden of proof under the standard of behavior test does not require a showing that the employee's conduct was willful, intentional, or deliberate. *Harris*, 141 Idaho at 4, 105 P.3d at 270. The first prong of the test addresses only what the employer subjectively expected from the employee, while the second prong considers whether the employer's expectations are reasonable. The record establishes that ALC subjectively expected Stark to disclose the identity of the person within the organization that told her of the rumor that Teton House was closing. Therefore, what this Court must determine is whether substantial and competent evidence supports the Commission's conclusion – that ALC's expectation that Stark disclose the source of the information about the closure of Teton House – was NOT objectively reasonable under the circumstances. The record does not support the Commission's conclusion.

In order for an employer's expectation to be objectively reasonable, the expectation must be communicated to the employee, unless the expectation is the type that flows naturally from the employment relationship. *Id.* An expectation flows naturally from the employment relationship when the expectations are common among employees in general or within a particular enterprise. *Appeals Examiner of Idaho Dep't of Labor v. J.R. Simplot Co.*,

131 Idaho 318, 322, 955 P.2d 1097, 1101 (1998). Such expectations are generally limited to fundamental expectations and do not involve specific rules unless clearly embodied in the job at issue. *See, e.g., Pimley v. Best Values, Inc.*, 132 Idaho 432, 435, 974 P.2d 78, 81 (1999) (holding that a retail employer has a reasonable expectation flowing naturally from the employment relationship that its employees will not make vulgar comments about coworkers and supervisors in the presence of customers and other coworkers); *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 434, 914 P.2d 564, 568 (1996) (finding that an employer's expectation that an employee will comply with federal rules and the employer's manual, which both required permission prior to crossing a runway, flowed naturally from a line service position at an airport). In other words, the relevant question is whether the employee has breached "a standard of behavior that would flow normally from an employment relationship or which was communicated to [the employee] because of its uncommon nature." *Wulff v. Sun Valley Co.*, 127 Idaho 71, 75, 896 P.2d 979, 983 (1995).

In this case, there was a reasonable expectation that employees will answer questions put to them by the President and CEO of the company. Such an expectation flows naturally from the employment relationship. *See Pimley v. Best Values, Inc.*, 132 Idaho 432, 974 P.2d 78 (1999). This expectation is supported by a clear policy – set forth in the employee handbook – that prohibited insubordination. President and CEO Bebo explained to Stark why it was important for ALC to know who was spreading rumors and specifically directed Stark to inform her who had told her. Stark point-blank refused. ALC's reasons for wanting to know the origins of the rumor were reasonable – ALC needed to stop the rumor from continuing and

needed to prevent any further damage to ALC's interests. To do so, it was imperative for ALC to find out the source of the rumor in order to put a stop to it.

The Commission's finding that Stark's refusal to disclose the source of the rumor was reasonable is wholly without support in the record. The evidence can only support the conclusion that Stark's refusal to disclose the source of the rumor was conduct that fell below a standard of behavior that ALC had a right to expect.

2. The Commission's conclusion – that ALC's directive to identify the source of the rumor was NOT reasonable – is not supported by substantial and competent evidence.

The Commission found that "the Commission is not inclined to find Employer's directive reasonable in this case." R. 21, p. 6. Surprisingly, the Commission found that ALC's directive was not reasonable because there was no evidence that identifying the cause of the rumor would allow ALC to stop it (". . . there is no indication that Employer's objective would be met unless Claimant revealed her source."). R. 21, p. 7. Incredibly, the Commission found that in order to stop the rumor, ALC should not worry about finding the source of that rumor, but should instead use "more viable options such as holding a meeting or distributing a memo." *Id.* In reaching this result, the Commission completely disregarded the ONLY testimony on point – the testimony of the President and CEO, who testified that ALC needed to know the source of the rumor to adequately protect ALC's interests. It is axiomatic that the way to stop a rumor is to go to the source of that rumor. Somehow, this essential fact seems to have escaped the Commission.

Moreover, the Commission glossed over the evidence that ACL interests were adversely impacted by the rumor, as Teton House had closed: ". . . there is little evidence that Claimant's failure to abide by Employer's directive directly caused harm." R. 21 p. 7. President and CEO Bebo – certainly in a position to know – testified that Teton had lost residents and had closed due to the rumor.

The Commission's conclusory assumptions as to the best way to stop a rumor are not supported by substantial and competent evidence. ACL's directive to the director of one of its assisted living units to identify the source of a rumor that could cause, and did cause, harm to ACL's interests was reasonable.

C. The Record Lacks Substantial, Competent Evidence To Support the Commission's Determination That Stark's Refusal To Provide Her Superiors with Important Requested Information Was a "Good Faith Error in Judgment or Discretion."

In its Decision and Order, the Commission determined that, even if ALC's directive to Stark to divulge the source of the rumor that Teton House was closing was reasonable, "this situation falls with an exception to misconduct," citing IDAPA 09.01.30.275.03. R. 21, p. 7. That section provides:

> **03. Inability to Perform or Ordinary Negligence.** Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, isolated instances of ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct connected with employment.

IDAPA 09.01.30.275.03.

The Commission based this determination on the fact that "there is no indication Claimant had a history of insubordination," and there is "little evidence" that Stark's refusal caused harm. R. 21, p. 7. Finally, the Commission found that there was no indication that ALC learning of the source would limit any harm. R. 21, p. 7.

Stark was asked several times by her superiors (Boyes and Bebo) to divulge the source of the rumor. The company President and CEO explained to Stark how and why this information was important, and that ALC needed the information to stop rumors from spreading and alleviate any harm the rumor had caused. Stark flat out refused to answer this reasonable request by her superior. There is no evidence in the record – much less substantial evidence – to support the Commission's conclusion that Stark's refusal to respond to Bebo's reasonable directive to provide information was a "good faith error in judgment."

D. The Commission Failed To Consider Whether Stark's Refusal To Provide Legitimately Requested Information Was a "Willful, Intentional Disregard of the Employer's Interest."

Besides disregard of the employer's expected standard of behavior and deliberate violation of the employer's reasonable rules, the supreme court has held that misconduct includes "a willful, intentional disregard of the employer's interest." *Kivalu,* 142 Idaho at 264, 127 P.3d at 167. As stated above, the Commission must consider all three grounds when determining whether an employee's termination was a result of employment-related misconduct. *Smith,* 132 Idaho at 884, 980 P.2d at 548.

In this case, the Commission failed to consider all three grounds for misconduct and instead determined that the issue could be disposed of under the standard of behavior test

and, thus, based its decision on the unsupportable ground that Stark's refusal to divulge the source of the rumor did not fall below the reasonable standard of behavior an employer is entitled to expect. The Commission completely failed to consider whether Stark's refusal to provide requested information demonstrated a willful, intentional disregard of the employer's interest. The appeals examiner, however, specifically addressed this issue:

> **The claimant's conduct in refusing to disclose the source of the rumor** was conduct that fell below a standard of behavior that the employer had a right to expect, and also **demonstrated a willful disregard for the employer's interests.**

R. 1, p. 3 (emphasis added).

The record evidence supports this analysis. President and CEO Lori Bebo explained to Stark the importance of this information and why ALC needed it. Bebo stressed to Stark that this recent information or rumor relating to the closure of Teton House was important and specifically informed Stark that she wanted to put an end to the rumors. Bebo asked Stark if she understood how important this information was, because ALC needed stop any further rumors, because ALC needed to inform personnel to assure them and let them know that the rumor was untrue. Stark acknowledged to Bebo she understood that importance. Tr. p. 17, LL. 3-4; p. 7, LL. 11-17.

Despite the President and CEO's detailed explanations, Stark subjectively did not believe this information was important and refused to provide the information her superior directed her to provide. The Claimant then flippantly stated that she would simply have to take one for the team. These actions demonstrate Stark's willful disregard for ACL's interest.

The Commission's failure to analyze whether Stark's actions were in willful disregard of ALC's interests, especially considering the record evidence that the withheld information was important to ALC's interest, and that this was conveyed directly to Stark, is reversible error.

IV. CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court set aside the Commission's Findings of Fact, Conclusions of Law and Order entered in this matter, as it is unsubstantiated by any competent evidence, and is contrary to the evidence presented.

DATED this 26th day of July, 2011.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Nancy J. Garrett – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2011, I caused a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

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